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6 IN THE COURT OF APPEALS
7 OF THE STATE OF WASHINGTON
8 DIVISION II

9 IN RE THE PERSONAL RESTRAINT
10 PETITION OF:

11 JAVIER ESPINOZA,

12 Petitioner.

NO. 45491-2-II

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

13
14 A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

- 15 1. Must the petition be dismissed where the petitioner cannot show actual
16 prejudice to a constitutional right or a fundamental defect resulting in a
17 miscarriage of justice?
18 2. May the petitioner dispute the calculation of his offender score where he
19 stipulated that it was correct?
20 3. May the petitioner dispute comparability of a foreign conviction where he
21 stipulated to it?
22 4. May the petitioner dispute "wash-out" of a prior conviction where he
23 stipulated that it did not wash out?
24 5. Did the trial court abuse its discretion in deciding the length of the
25 exceptional sentence?

1 B. STATUS OF PETITIONER:

2 Petitioner, Javier Espinoza, is restrained pursuant to a Judgment and Sentence
3 entered in Pierce County Cause No. 12-1-01852-1. CP 509-521. The petitioner filed a
4 direct appeal. This Court has consolidated the Personal Restraint Petition.

5 The procedural and substantive facts are set forth in detail in the State's response to
6 the direct appeal. The State incorporates its response brief by reference to avoid
7 duplication of arguments.

8 C. ARGUMENT:

9 1. PETITIONER'S BURDEN.

10 To obtain relief in a personal restraint petition challenging a judgment and
11 sentence, the petitioner has the burden to show actual and substantial prejudice resulting
12 from alleged constitutional errors, or, for alleged nonconstitutional errors, a fundamental
13 defect that inherently results in a miscarriage of justice. *In re Personal Restraint of Cook*,
14 114 Wn.2d 802, 813, 792 P.2d 506 (1990).

15 2. OFFENDER SCORE.

- 16 a. Although petitioner stipulated to his offender score, the facts
17 regarding same criminal conduct are not in dispute.

18 In the Brief of Respondent, the State agrees that Counts I and II are the same
19 criminal conduct for the offender score. Generally, where a defendant stipulates that an
20 offender score is correct, he cannot argue on appeal that the two offenses are the same
21 criminal conduct, because such a finding requires a factual determination and the court's
22 discretion. *See State v. Nitsch*, 100 Wn. App. 512, 997 P.2d 1000 (2000). However, in this
23 case, the facts concerning same criminal conduct are not in dispute. *Cf. In re Personal*
24 *Restraint of Cadwallader*, 155 Wn.2d 867, 875, 123 P.3d 456 (2005).
25

1 b. Petitioner waived challenge to comparability of out-of-state
2 conviction in his stipulation to calculation of offender score.

3 When a defendant affirmatively acknowledges or stipulates to his criminal history,
4 including the “existence and comparability” of out-of-state convictions, the State need not
5 provide further proof and the history may be included in the defendant's offender score at
6 the time of sentencing. ***State v. Ross***, 152 Wn.2d 220, 233, 95 P.3d 1225 (2004). ***State v.***
7 ***Bergstrom***, 162 Wn.2d 87, 94, 169 P.3d 816 (2007).

8 Here, the petitioner stipulated to the calculation of his offender score. Appendix A,
9 CP 506-508. He specifically stipulated that his prior out of state conviction was equivalent
10 to a Washington felony. *Id.*, at 506. Therefore, the petitioner cannot now challenge this
11 determination.

12 Also, even assuming error, it would be harmless. The standard range sentence for
13 UPCSVID with a score of 0-2 is 12+ -20 months. RCW 9.94A.517, 525(13). So,
14 recalculation of his offender score does not alter the standard range.

15 c. Wash-out.

16 Similarly, when a defendant stipulates to his criminal history, further proof or
17 determination of “wash-out” is unnecessary. The wash-out provision of RCW
18 9.94A.925(2) requires factual determinations and exercise of discretion by the trial court,
19 such as when prior crimes occurred and whether intervening offenses or incarcerations
20 prevented the wash out. A defendant waives a challenge to an allegedly invalid sentence
21 where he agrees to facts, later disputed, or where the alleged error involves a matter of trial
22 court discretion. ***Cadwallader***, 155 Wn.2d at 875; ***In re Personal Restraint Petition of***
23 ***Goodwin***, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

24 The petitioner waived this challenge when he stipulated to his offender score
25 calculation. Appendix A, CP 506-508.

1 3. LENGTH OF EXCEPTIONAL SENTENCE.

2 a. Challenge to the court's exercise of discretion does not fall
3 within the purpose of the PRP.

4 The petitioner fails to demonstrate that this exercise of discretion is a constitutional
5 issue. He does not argue that it violates the Fifth, Eighth, or 14th Amendments to the
6 United States Constitution, or any provision of the Washington Constitution. Neither does
7 he demonstrate that this exercise of discretion was so outrageous as to be a fundamental
8 defect resulting in a miscarriage of justice. Therefore, this claim must be denied.

9 b. The trial court did not abuse its discretion.

10 The length of an exceptional sentence is reviewed only for abuse of the trial court's
11 discretion. *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995). A reviewing court
12 must find that the sentence is one no reasonable person would have imposed, one based on
13 untenable grounds or imposed for untenable reasons. *Id.*, at 392–393. Put another way:

14 In order to abuse its discretion in determining the length of an exceptional
15 sentence above the standard range, the trial court must do one of two things:
16 rely on an impermissible reason (the “untenable grounds/untenable reasons”
17 prong of the standard) or impose a sentence which is so long that, in light of
18 the record, it shocks the conscience of the reviewing court (the “no
19 reasonable person” prong of the standard). Indeed, once a reviewing court
20 has determined that the facts support the reasons given for exceeding the
21 range and that those reasons are substantial and compelling, there is often
22 nothing more to say.

23 *State v. Ross*, 71 Wn. App. 556, 571-572, 861 P.2d 473 (1993). *See also State v. Knutz*,
24 161 Wn. App. 395, 411, 253 P.3d 437 (2011).

25 Here, the court observed that the defendants in this case, as large-quantity
traffickers, were responsible for feeding the addictions, and destroying the lives of many
more people than street-level dealers. 10 RP 17-18. As to the specific length of sentence,
one of the co-defendant's counsel pointed out that, in federal court, the sentence for a
similar crime was approximately 15 years in prison. 10 RP 8. The court noted that the

1 sentence that the State was requesting was about the same. 10 RP 10. The court sentenced
2 the petitioner to 96 months, plus the school zone enhancement, for a total of 120 months.
3 That is less time than the petitioner would have received for the same crime in federal
4 court.

5 It was not "shocking" or unreasonable for the state trial judge imposes a sentence
6 roughly commensurate with the penalty for the same crime in federal court.

7
8 4. SUFFICIENCY OF THE EVIDENCE OF SCHOOL ZONE.

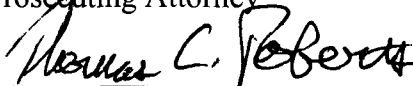
9 This issue is addressed in the State's Brief of Respondent.

10 D. CONCLUSION:

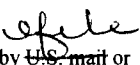
11 The petitioner fails to demonstrate the necessary errors for relief. For the reasons
12 discussed above and in the State's Brief of Respondent, the State respectfully requests that
13 the petition be denied.

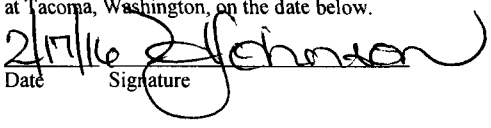
14 DATED: February 17, 2016

15 MARK LINDQUIST
16 Pierce County
17 Prosecuting Attorney

18 
THOMAS C. ROBERTS
19 Deputy Prosecuting Attorney
WSB # 17442

20 Certificate of Service:

21 The undersigned certifies that on this day she delivered by  ~~U.S. mail~~ or
22 ABC-LMI delivery to the petitioner true and correct copies of the document to
23 which this certificate is attached. This statement is certified to be true and
correct under penalty of perjury of the laws of the State of Washington. Signed
at Tacoma, Washington, on the date below.

24 
Date Signature

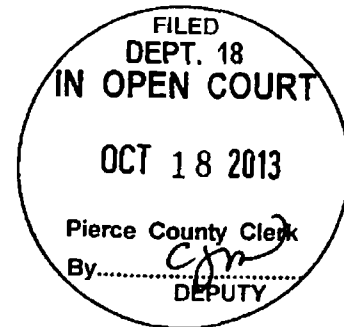
APPENDIX “A”

Stipulation on Prior Record

Case Number: 12-1-01852-1 Date: February 17, 2016
 SerialID: 4DF1F8B9-5694-4727-A457D2CFEE1861F2
 Certified By: Kevin Stock Pierce County Clerk, Washington



12-1-01852-1 41414884 STPPR 10-18-13



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 12-1-01852-1

vs.

JAVIER ESPINOZA,

STIPULATION ON PRIOR RECORD
AND OFFENDER SCORE
(Plea of Guilty)

Defendant.

Upon the entry of a plea of guilty in the above cause number, charge UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER; UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER, the defendant JAVIER ESPINOZA, hereby stipulates that the following prior convictions are HIS complete criminal history, are correct and that HE is the person named in the convictions. The defendant further stipulates that any out-of-state convictions listed below are equivalent to Washington State felony convictions of the class indicated, per RCW 9.94A.360(3)/9.94A.525:

ALL CURRENT CONVICTIONS, THIS CAUSE NUMBER

Count	Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	A or J Adult Juv	Type of Crime	Class	Score by Ct	Felony or Misdemeanor
I	UPCSWD		PIERCE, WA	05/17/12	A	NV	B		FELONY
II	UPCSWD		PIERCE, WA	05/17/12	A	NV	B	1	FELONY

[] The defendant committed a current offense while on community placement (adds one point to score).
RCW 9.94A.525.

OTHER CURRENT CONVICTIONS, OTHER CAUSE NUMBERS (if any)

[X] None Known or Claimed, or:

Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	A or J Adult Juv	Type of Crime	Class	Score by Ct	Felony or Misdemeanor
N/A								

STIPULATION ON PRIOR
RECORD AND OFFENDER SCORE -1
jsprior-plea.dot

Office of Prosecuting Attorney
930 Tacoma Avenue S Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

PRIOR CONVICTIONS (if any)

[] None Known or Claimed, or:

Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	A or J Adult Juv	Type of Crime	Class	Score by Ct	Felony or Misdemeanor
FORCE/ADW NOT FIREARM GBI LIKELY	01/09/06	MANTECA, CA	01/08/05	A	V	B	1	FELONY

The defendant stipulates that the above criminal history and scoring are correct, producing an offender score as follows, including current offenses, and stipulates that the offender score is correct:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	2	II	12+ - 20 MOS	24 MOS	24 - 44 MOS	20 YRS/ \$10,000
II	2	II	12+ - 20 MOS	24 MOS	24 - 44 MOS	20 YRS/ \$10,000

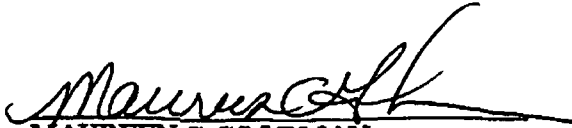
*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46 61 520, (JP) Juvenile present.

The defendant further stipulates:

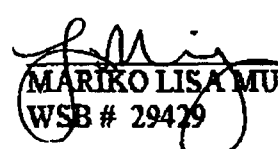
- 1) Pursuant to Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), defendant may have a right to have factors that affect the determination of criminal history and offender score be determined by a jury beyond a reasonable doubt. Defendant waives any such right to a jury determination of these factors and asks this court to sentence according to the stipulated offender score set forth above.
- 2) That if any additional criminal history is discovered, the State of Washington may resentence the defendant using the corrected offender score without affecting the validity of the plea of guilty,
- 3) That if the defendant pled guilty to an information which was amended as a result of plea negotiation, and if the plea of guilty is set aside due to the motion of the defendant, the State of Washington is permitted to refile and prosecute any charge(s) dismissed, reduced or withheld from filing by that negotiation, and speedy trial rules shall not be a bar to such later prosecution;
- 4) That none of the above criminal history convictions have "washed out" under RCW 9.94A.360(3)/9.94A.525 unless specifically so indicated. If sentenced within the

standard range, the defendant further waives any right to appeal or seek redress via any collateral attack based upon the above stated criminal history and/or offender score calculation.

Stipulated to this on the 18th day of Oct., 2013.


MAUREEN C GOODMAN
Deputy Prosecuting Attorney
WSB # 34012


JAVIER ESPINOZA


MARIKO LISA MULLIGAN
WSB # 29429

mrp

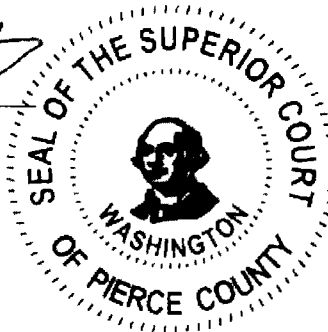
State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 17 day of February, 2016



Kevin Stock, Pierce County Clerk

By /S/Tyler Wherry, Deputy.

Dated: Feb 17, 2016 8:00 AM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

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PIERCE COUNTY PROSECUTOR

February 17, 2016 - 8:36 AM

Transmittal Letter

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Case Name: In re the PRP of: Javier Espinoza

Court of Appeals Case Number: 45491-2

Is this a Personal Restraint Petition? ☒ Yes ☐ No

The document being Filed is:

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Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

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Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

☒ Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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Comments:

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